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IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA

JESUS MORA FLORES and LETICIA CERVANTES MORA,

Petitioners

v.

ERIC H. HOLDER, ATTORNEY GENERAL, et al

Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Supreme Court Bar
Admission Pending

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QUESTIONS PRESENTED FOR REVIEW

Whether the Ninth Circuit Court, applying its decision in **De La Cruz v. Mukasey**, 532 F.3d 946 (9th Cir. 2008), in holding that **Stone v. INS**, 514 U.S. 386 (1995), which held that filing a Motion to Reopen with the Board of Immigration Appeals does not toll the time for filing a Petition for Review of an Order from the BIA with the Circuit Court, also applies in the inverse by non-tolling of time for filing a Motion to Reopen while a Petition for Review with a Stay of Removal, is under review with the Circuit Court, was in error, denied Petitioners procedural due process and equal protection rights under the 14th Amendment to the U.S. Constitution, to raise issues involving newly discovered evidence in post-appellate review, or at the very least misapplied **Stone v. INS**, and therefore **De La Cruz v. Mukasey** and all other similar case decisions by other Circuit Courts should be overruled by this Court?

Whether the Ninth Circuit Court, in rendering its decision by applying its 2008 holding in **De La Cruz v. Mukasey**, even if

such is not a constitutional violation under the 14th Amendment, misapplied the Supreme Court's clear intent in its ruling in **Stone v. INS**, and in doing so violated the clear intent of the procedural law of **8 U.S.C. secs. 1252(c)(6)(c), 1252(c)(3)(A),** and **1229a (c)(7)(A), (C)(i), and 8 C.F.R. 1003.2 (c)(2)**, as applied to the statutory right of Petitioners to pursue Motions to Reopen based upon newly discovered evidence, and therefore demands that **De La Cruz v. Mukasey** and the decisions made by the BIA and other similar case decisions by other Circuit Courts should be overruled by this Court, to wit, whether the Ninth Circuit Court, in rendering its decision on the Petition for Review, failed to consider whether the Stay of Removal, granted by the Circuit Court pending the result of its review of the Petitioner's Appeal, reset the ninety-day time period to file the Petition to Reopen their case with the Board of Immigration Appeals until after the Circuit's Mandate of their earlier Petition for Review?

Whether the Ninth Circuit panel, in its ruling based upon **De La Cruz v. Mukasey**, erred in failing to render an interpretation in a case of first impression in federal courts, of the time limits of Voluntary Departure under 8 U.S.C. sec. 1250 (b), INA sec. 240B,

that filing the Petition for Review and obtaining a Stay of Removal pending the Circuit Court's ruling on the Petition for Review, resets the time for voluntary departure following the decision in the initial judgment of the Immigration Judge and Appeal to the Board of Immigration Appeals, which would allow Petitioners to timely file a Motion to Withdraw Voluntary Departure, allowing them in turn to file a Motion to Reopen with the BIA?

INTERESTED PARTIES

In addition to the party named in the caption of the case, through the U.S. Department of Justice's Office of Immigration Litigation, one other interested party includes the U.S. Department of Homeland Security, particularly the

Office of Immigration and Customs Enforcement. The parties addresses for purposes of service of process are given in the Certificate of Service included at the close of the Petition for Writ of Certiorari herein. And likewise in compliance with **SUP. CT. R. 29.4**, and **28 U.S.C. sec. 1746**, the Solicitor General of the United States is likewise served.

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The Ninth Circuit has failed to distinguish between the Supreme Court's clearly stated intent in its holding in **Stone v. United States**, 514 U.S. 386 (1995) and the clear intent in 8 U.S.C. sec. 1229a(c)(6)(A),(C)(i), through their recent precedent in **De La Cruz v. Mukasey**, 532 F.3d 946 (9th Cir. 2008), as well as in the BIA's policy of the same principle, that Motions to Reopen based upon newly discovered evidence are foreclosed via the resort to exercise legitimate appellate rights, and therefore are a significant difference between limitation of appellate rights and the subordinated position of exercisable administrative remedies, and the forced Hobson's choice held in **De La Cruz** is a violation of Fifth/Fourteenth Amendment due process/equal protection rights, and should be overruled.

The Ninth Circuit has, in the alternative, misapplied the principle set by the Supreme Court in the case of **Stone v. INS**, **supra,** and therefore has failed to properly differentiate **Fed Rule of Appellate Procedure 8 and 18** and **8 U.S.C. sec. 1229a** differing applications, necessitating that **De La Cruz v. Mukasey**, as well as the Circuit Court's decision appealed by Petitioners, should be overruled and reversed, and, even if **De La Cruz v. Mukasey** is acceptable law, the Circuit Court and the BIA failed to note the fact that the Petitioner's filing of a Petition for Review was accompanied by a Motion for Stay of Removal, which was granted by the Court under **Fed. R. App. Pro. 8**, and which acts as a stoppage of any and all effects from the order of removal at issue, including the running of the timetable from

date of the administrative order until its finality under **8 U.S.C. sec. 1229a(c)(7)(A)**; **8 C.F.R. sec. 1003.2**, including motions to reopen.

The Ninth Circuit has, likewise, failed to rule on the issue that is a case of first impression in American federal immigration law, if, when a Petition for Review is filed, and more importantly and precisely, a Motion for Stay of Removal pending ruling of the Petition for Review, the time allotted under **8 U.S.C. sec. 1229a** for filing a Motion to Reopen based upon newly discovered evidence of extreme and unusual hardship, does not continue nor is tolled, but is rather reset, allowing a full ninety-day period for filing such motion following the Circuit Court's issuance of its ruling and/or mandate, which necessitates that the Supreme Court hold that the Motion to Stay Removal filed with an appellate court of review resets the statutory time for filing a Motion to Reopen with the BIA.

The Ninth Circuit has, in the same manner, failed to properly address the question of first impression concerning the possible reset of administrative timetable for the Petitioners to file a request to Withdraw Voluntary Departure pursuant to **INA sec. 240B(d); 8 U.S.C. sec. 1229c(b)(2)**, an Order granted earlier in the case by the Immigration Judge hearing the case, the expiration of which devastated the Petitioners due to the BIA's pronounced inability to consider a Motion to Reopen, which would be cut off due to the apparent running of the time allowed for Voluntary Departure, which therefore demands relief by ruling on the issue of a reset of the administrative timetable

for filing for withdrawal of Voluntary Departure, which would allow Petitioners to timely file Motion to Reopen.

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PETITION FOR WRIT OF CERTIORARI

Jesus Mora Flores and Leticia Cervantes Mora, husband and wife, respectively, and Petitioners herein, respectively petitions the Supreme Court of the United States

for a Writ of Certiorari to review the sealed and unpublished judgment of the United States Court of Appeals for the Ninth Circuit, rendered and entered in San Francisco, California, on May 10, 2010, (Appendix A-3), with Petition for Panel Rehearing dismissed on July 26, 2010, and the Mandate entered on August 3, 2010 (Appendix A-4). Said judgment affirmed a ruling made by the Board of Immigration Appeals (BIA), rendered on October 26, 2009, that dismissed a Motion to Reopen an earlier decision made by the BIA on August 8, 2008. (Appendix A-5; Immigration Case Number 096-346-349; 096-346-350) That decision was appealed to the Ninth Circuit in Case Number 08-73848, which was upheld in a decision on May 19, 2009. (Appendix A-1), subsequent to which the BIA dismissed the aforementioned Motion to Reopen. (Appendix A-3).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Ninth Circuit, which

dismissed the Petitioners' Petition for Review and upheld the BIA's dismissal and refusal to consider either directly or sua sponte the Petitioners' Motion to Reopen and Motion to Withdraw Voluntary Departure in its earlier order herein, which involves the issues argued herein, is contained in the Appendix (A-3). Likewise the BIA's dismissal of the Motion to Reopen is likewise contained in the Appendix (A-6), as is the denial of the earlier Petition for Review by the Ninth Circuit (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked pursuant to **28 U.S.C. sec. 1254(1)** and PART III of the Rules of the Supreme Court of the United States, particularly under **SUP. CT. R. 10 (c)**, which authorizes presenting of Petitions for Writ of Certiorari on matters that involve matters of national application, in which "a United States court of appeals has decided an important federal question that has not been, but should be settled by this

Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." The Ninth Circuit Court of Appeals decision denying rehearing was rendered on July 26, 2010. Therefore, this appeal was timely filed pursuant to **SUP. CT. R. 13.1** (2010). The BIA had jurisdiction over the case, begun as a an Application for Cancellation of Removal, under **Section 240A** of the Immigration and Nationality Act. **8 U.S.C. sec. 1252(a) (1)**, and over the appeal thereof and the subsequent Motion to Reopen, under **8 U.S.C. sec. 1229a (c)(7)(A),(C)(i)**. The court of appeals had jurisdiction of the appeal pursuant to **8 U.S.C. sec. 1252(b)(3), sec. 242(b)(3)** of the Immigration & Nationality Act (INA), which allows for Petition for Review of cases emerging from judgments of Immigration Judges or decisions on appeal by the BIA which involve matters involving legal or constitutional determination, as opposed to factual or discretionary review. In addition, the court of appeals had jurisdiction over the case under the Supreme Court's decision in **Kucana v. Holder**, 558 U.S. ____ , 130

S.Ct. 827 (2010). The Petition herein was timely filed on October 25, 2010.

CONSTITUTIONAL, STATUTORY, & OTHER PROVISIONS

Petitioners will rely upon the following Constitutional, Statutory, and Regulatory provisions, treaties, rules, and ordinances:

U.S. CONST. AMEND. V, XIV:

> [N]or shall any person....be deprived of life, liberty, or property, without due process of law....
>
> No shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

IMMIGRATION AND NATIONALITY ACT (INA) Section 240A, 8 U.S.C. sec. 1229a(c)(7)(A),(C)(i):

> Any decision made by an Immigration Judge involving an order mandating removal or in appeal from an Immigration Judge's ruling before the Board of Immigration Appeals, ... are deemed administratively

> final....Any Motion to Reopen or Reconsider shall be considered if filed within ninety (90) days of the date of the order of the BIA....and shall be limited to one Motion to Reopen....unless subject to a stay of removal. No Motion to Reopen shall be considered after the running of time for the Petitioner to leave the United States under an order of Voluntary Departure, unless a Motion to withdraw said voluntary departure has been made and granted by the reviewing tribunal.

IMMIGRATION AND NATIONALITY ACT (INA) Section 240B, 8 U.S.C. sec. 1229c(b)(1)(2):

> At conclusion of proceedings...The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal... (2) Period...Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days.

IMMIGRATION AND NATIONALITY ACT (INA) Section 204A, 8 U.S.C. sec. 1229b(b)(1);

> (b) **Cancellation of removal and adjustment of status for certain nonpermanent residents**
> (1) **In general...** The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
> (B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182 (a)(2), 1227 (a)(2), or 1227 (a)(3) of this title, subject to paragraph (5); and
(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 CODE OF FEDERAL REGULATIONS Section 1003.2(c)(2) – Reopening or reconsideration before the Board of Immigration Appeals.

(c) Motion to Reopen. (1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material.....A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is **material and was not available and could not have been discovered or presented** at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the [initial] hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in [sec.] 1000.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application of relief under section 212(c) of the Act (8 U.S.C. sec. 212(c)).

(2) Except as provided in paragraph (c)(3) of this section, a party **may file only one motion** to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed **no later than 90 days after the date on which the** final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

8 C.F.R. sec. 1003.23(b)(1)

A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.

STATEMENT OF THE CASE

Petitioners, who are citizens and immigrants from Mexico, were the petitioners-applicants in the original case of the

Application for Cancellation of Removal before the Immigration Judge, and were the Petitioners in the appeal thereof before the Board of Immigration Appeals, and were likewise the Petitioners in the Petition for Review before the Ninth U.S. Court of Appeals. The Government, both the Department of Justice's Office of Immigration Litigation, and the Department of Homeland Security, especially the Immigration and Customs Enforcement office (ICE), was and shall be referred to as either "the Government" or as Respondents. The record is noted by customary reference to record volume and docket numbers.

Petitioners are still presently free, under a Motion to Reconsider/Motion to Reopen (based upon a claim of ineffective assistance of counsel) coupled with a Motion to Stay Removal pending review by the BIA, and are presently living in Lompoc, California, as husband and wife, with their two native-born United States citizen daughters, ages 16 and 10 (Appendix A-5).

Account of Proceedings and Disposition in the Initial Case Application for Cancellation of Removal Before Immigration Judge and BIA

On March 21, 2003, Petitioners, citizens and immigrants from Mexico, who have resided continually in the United States since 1991, were served with a Notice to Appear as the result of a notario-filed asylum application in which they were informed erroneously that they could obtain permanent residency in immigration court. The notario hired a courtroom attorney, Bernard Grenada, and on October 1, 2003, the attorney withdrew the asylum application and requested Cancellation of Removal (COR) and Voluntary Departure. (See Appendix A-8, Brief of Petitioners 8-10-2010).

Thereafter, a different attorney was hired, one Patricia Boag, who first filed two continuances that were both granted by the Immigration Judge (IJ), but then she failed to appear at the mutually agreed-upon June 15, 2004 court date. On September 1, 2004, Patricia Boag also failed to appear. On January 26, 2005, Ms. Boag filed the COR application in court

before the IJ. On February 9, 2006, after multiple resets and continuances, the IJ denied COR relief urged merely on the issue of hardship. (Appendix A-8, Brief of Petitioners).

Ms. Boag was thereupon hired to appeal the case on behalf of the Respondents but she failed to timely file the appeal, due to an asserted claim of poor health, which had led her to close her law practice but left the Respondents in jeopardy of forfeiture of their legal rights. Upon discharging Ms. Boag and obtaining a different attorney, one Joseph Porta of Santa Fe Springs, California, Petitioners filed a Motion to Accept an Untimely Appeal due to Ms. Boag's ineffective assistance following compliance with the requirements under **Matter of Lozada,** 857 F.2d 10, 13 (1st Cir. 1988). On April 25, 2007, the BIA granted that Motion. (Appendix A-5, Exhibit B). Following briefing, on August 8, 2008, the BIA denied the Appeal (Appendix A-5).

On September 8, 2008, Mr. Porta filed a timely Petition for Review with the Ninth Circuit Court of Appeals, with a Motion for Stay of Voluntary Departure and Removal,

of which the stays were granted (Appendix A-6). On February 26, 2009, the Ninth Circuit granted the Government's Motion to Dismiss but extended the Stay of Removal and Voluntary Departure until issuance of the Mandate (Appendix A-1, at 4). That temporary order was done in accordance with the holdings of the Supreme Court in **Nken v. Holder**, 556 U.S. ___, 2009 LW at 1065876 (2009). In March 2009, Respondent Leticia Cervantes Mora was treated for severe medical complications, while doing so, her examining medical specialist discovered a tumor on her pituitary gland (Appendix A-6, at 2).

On or about April 1, 2009; Petitioners hired attorney Robert Jacobs to file a Motion to Reopen (MTR) in this case with the BIA based on this new medical information. April 7, 2009, Mr. Jacobs paid the MTR fee. (Appendix A-8, Board of Admin. Appeals Adm. Rec., Exhibit E&F). In April 2009, Mr. Jacobs specifically advised Petitioners to remain in the U.S. and continue with all necessary medical treatment while

the Motion to Reopen/Withdraw Voluntary Departure was filed and adjudicated (Appendix A-8, Exhibit D).

On May 19, 2009, the Ninth Circuit issued its formal Mandate of the Court and its removal of the stay on enforcement and finality of the BIA's denial of the Petition for Cancellation of Removal and the order granting Voluntary Departure dismissing the initial Ninth Circuit appeal under Petition for Review (Appendix A-1, case number 08-73848). On July 15, 2009, Mr. Jacobs filed a Motion to Withdraw Voluntary Departure with the BIA under the rule in **Dada v. Mukasey**, 584 U.S. ___, 128 S.Ct. 640 (2008), (Appendix A-6), and on July 20, 2009, he filed a Motion to Reopen with the BIA. (**Id.**) On October 29, 2009, the BIA filed its Order denying the Motion to Reopen as untimely filed and the Motion to Withdraw the request for Voluntary Departure, effective immediately (Appendix A-6).

On November 17, 2009, Petitioners replaced Mr. Jacobs with Mr. Javier Pineda, who filed a Petition for Review with the 9th Circuit Court of Appeals, claiming 1) the filing of

the original Petition for Review tolled the period of the Motion for Withdrawal of Voluntary Departure, and 2) the filing of the Petition for Review reset the period following the BIA's Order, for filing a Motion to Reopen. (On February 26, 2010, the Circuit Court issued its ruling dismissing the Petition for Review on all grounds (Appendix A-3, Case Number 09-73795), and issued its mandate confirming its dismissal of the PFR (Appendix A-4).

Present counsel was retained for a Motion for Rehearing of the Circuit Court's ruling, which was filed on July 6, 2010, which restated that novel questions of law and fact were ignored by the 9th Circuit, in particular the fact that the attention on the filing of the Petition for Review in determining the running of time to finality of the BIA order under 8 U.S.C. sec. 1227(a) is misplaced, that an Order was made to stay removal, and that the issue of whether the stay of removal resets, rather than toll the time running of both voluntary departure and motions to reopen, is a question of novel first impression. (Appendix A-7, PACER?). However,

the Circuit Court issued its Order denying the Motion for Rehearing on July 26, 2010 (Appendix A-4).

REASONS FOR GRANTING THE WRIT

The Court of Appeals, along with the BIA, foreclosed even the consideration of two extremely vital questions, that impact all five points of error alleged herein: 1) the question of first impression anywhere, whether the time for filing motion to reopen/motion to withdraw voluntary departure is reset upon filing a motion to stay removal in concert with a petition for review with the circuit court; 2) the issue of whether the filing of the motion to stay removal in concert with a petition for review acts to override the determination of **Stone v. INS**, 514 U.S. 386 (1995), that the filing of a motion to reopen does not toll or reset the running of the appellate timetable to file a petition for review of a decision of the BIA or Administrative Appeals Office (AAO). In addition the Court of Appeals and BIA dismissively failed to consider the issue of whether the 9th Circuit's decision in **De La Cruz v. Mukasey**, 532 F.3d 946 (9th Cir. 2008), which held that the

filing of a petition for review does not toll (or reset) the time allowed to an immigrant petitioner to file a motion to reopen or reconsider with the BIA, is also an improper application of **Stone v. United States**, **supra**, and therefore should be overruled. In failing to consider or rule properly on these questions, and their resultant cut off of the rights of Petitioners to raise a motion to reopen at the BIA, based upon the newly-discovered medical condition of Petitioner Leticia Cervantes Mora, it acted as a denial upon their due process and equal protection rights under the 14th Amendment of the U.S. Constitution. It forced them to have chosen between a Motion to Reopen for which they only became able to pursue after filing the original Petition for Review, and the route they chose of filing the Petition for Review (Appendix A-3, A-8—Motion to Stay Removal—see Petitioner's Brief).

Failure to Consider First Impression Issue of Reset Post-Appellate Timetable on the Issue of Voluntary Departure is Reversible Error:

In the original determination of the Immigration Judge, and as affirmed by the BIA, Petitioners were granted 60 days voluntary departure because they had established good moral character in the record of proceedings and their supportive evidence. **Appendix A-5**. Indeed, the Ninth Circuit understood the principle of the effect of their stay pending petition for review, for their ruling in this case including an entry lifting the stay on enforcement of the IJ/BIA's order. **Appendix A-1**, **supra**, at 2. The order granting voluntary departure was affirmed in the BIA's order de novo granted on August 8, 2008. **Appendix A-5**, supra, at 2. On May 19, 2009 the Ninth Circuit issued the mandate solemnizing the judgment in the case denying the original petition for review. **Appendix A-2**, supra. On July 15, 2009, prior counsel filed a motion to withdraw voluntary departure, which was some 55 days after the mandate. However, the BIA, in reviewing the original motion to reopen, they held that, despite the petition for review and motion for stay, that the 60-day voluntary departure period began to run immediately after the August 8,

2008 ruling. **Appendix A-6, supra**, at 3. Since Petitioners did not file the petition for review and motion for stay with the Ninth Circuit until September 8, 2008, the BIA ruled that Petitioners lost 31 of the 60 days allotted them. **Id.**, at 3. Therefore, the BIA, and later the Circuit Court held that the order of voluntary departure was merely tolled, and restarted after the Court's mandate on May 21, 2009, which resulted in the motion to withdraw voluntary departure being held as expired, and therefore denied, citing **Zazueta-Carillo v. Ashcroft**, 322 F.3d 1166, 1174(9th Cir. 2003). They further applied **8 C.F.R. sec. 1240.26**, to wit, "Authority to extend the time within which to depart voluntarily is solely within the jurisdiction of Immigration and Customs Enforcement officials." **Appendix A-3, at 3 Appendix A-6.**, at 3. The Ninth Circuit applied the same reasoning, and furthermore held that to deem Petitioners as timely filing the motion to withdraw removal was in the form of a request to extend the time originally granted for voluntary departure, which the Circuit Court lacked jurisdictional authority to grant. **Id.**, at 3.

Therefore, both BIA and Ninth Circuit held that as a result the Petitioners had overstayed the time period of voluntary departure and so the request to withdraw voluntary departure was denied. **Id.** at 3, **Appendix A-6** at 3. As a result, even if otherwise able to demonstrate a valid extreme and extraordinary hardship demanding a grant of the motion to reopen, it was foreclosed by the expiration of the voluntary departure period, a true "King's X" shutoff of any options to demonstrate the efficaciousness of granting cancellation of removal for Petitioners. **Appendix A-3**, at 3.

Petitioners requested, in their petition for review to the Ninth Circuit, that the court make an interpretation of the timing rules of voluntary departure; specifically, whether the filing of a petition for review with the circuit court of appeals resets the time granted for voluntary departure. **Appendix A-7**, PACER, Petitioner's Brief in Opposition at 8, March 1, 2010). Petitioners noted that it was an issue of first impression in the Ninth Circuit, and therefore was a reasonable expression of the purpose for granting voluntary

departure. **Id.**, at 8 But the circuit court completely ignored the argument made by Petitioners, and simply denied the motion to withdraw voluntary departure based upon overstay. **Appendix A-3, at 3.**

The rigid interpretation made by the BIA and the Ninth Circuit or the voluntary departure regulation is completely contradictory to the fact that voluntary departure is meant to be a sort of reward. An alien is only granted voluntary departure if the Immigration Judge or the BIA finds that he or she is worthy based on factors such as good moral character. The time granted to voluntarily depart is meant to allow the alien time to set their affairs in order prior to leaving the country upon the issuance of a final order of removal. However, this reward function is stripped of its generous veneer when the BIA rigidly enforces its timing rules. An effected alien such as Petitioners are essentially granted voluntary departure but is given no time to meaningfully consider his right to appeal to a higher court. The Petitioners must either file an appeal immediately within days to preserve

voluntary departure time, with or without any factual circumstances that would constitute extreme and exceptional circumstances, risking dismissal based upon a frivolous petition to reopen, expending further money in filing fees and attorney's fees, or run the risk of retaining little time to settle his affairs prior to leaving, and run the further risk of being penalized for further considering his right to appeal. Whereas an alien who is not found worthy of voluntary departure is placed under no extra burdens when choosing whether to file an appeal, aliens "rewarded" with voluntary departure are actually being punished by overly rigid timing rules.

Logically, if an alien granted voluntary departure decides to pursue his right to appeal the BIA decision, the time granted to him to voluntarily depart should not start to run until after that appeal is finalized. It would be extremely unfair and contrary to the spirit and full intent of the grant in the INA of voluntary departure to require an alien to simultaneously fight his appeal and sell off his belongings that

he cannot take with him out of the country. In this scenario, an alien could win his appeal and still be left with almost nothing because he had to hastily prepare to depart.

Therefore, Petitioners argue that if an alien granted voluntary departure decides to pursue his right to appeal, the time granted to him to voluntarily depart should not start to run until after that a decision on the appeal becomes final. Thus, in order to give full efficacy to the "reward" nature of voluntary departure, the Supreme Court herein should rule that an alien's filing of a petition for review effectively resets the time that he has been granted for voluntary departure and the voluntary departure time does not start unless the Motion to Stay Voluntary Departure is denied or until issuance of the Mandate of the judgment is made.

The issue has never been before any federal court, including the Supreme Court, which makes it an issue of national implication. **SUP. CT. R. 10(c)**. The federal appellate courts, including this Honorable Court, is not barred by the INA from hearing it. Therefore, this Court retains

jurisdiction, as did the Ninth Circuit, over Petitioners' claims herein, and to refrain from so ruling was a case of neglect by the Ninth Circuit, and was, in fact an act of puzzling inconsistency. That is so because the Ninth Circuit, in imposing its original stay, actually engaged in set aside of enforcement of what would otherwise be, on its face, a violation of **INA sec. 240B** by Petitioners, in which it says:

> (i) Effect of filing a petition for review. If, prior, to departing the United States, the alien files a petition for review pursuant to **section 242** of the Act **(8 U.S.C. sec. 1252)** or any other judicial challenge to the administratively final order, any grant of voluntary departure shall terminate automatically upon the filing of the petition or other judicial challenge and the alternate order of removal entered pursuant to paragraph (d) of this section shall immediately take effect. **8 U.S.C. sec. 240B.**

However, the Ninth Circuit in its original petition for review ruling in Case 08-70848, prior to the challenged case herein, as well as in the case appealed from, made it clear that their stay of removal had prevented termination of the order of voluntary departure. **Appendix A-1, at 3. see Appendix A-3**, at 2). The

Ninth Circuit failed to see the fact that their decision to grant stay of voluntary departure was in effect a stay of the termination of voluntary departure.

In addition, the Circuit Court failed to consider the fact that, under the case of **Franco-Rosendo v. Gonzales**, 454 F.3d 965, 968(9th Cir. 2006), the BIA is legal, non-discretionary principle, not entitled to deny reopening as a matter of discretion based solely on the failure to post a voluntary departure bond *or to depart voluntarily without also considering the favorable factors in support of reopening* (italics added). **Id.** Therefore, the Court is well-served to reverse the Circuit Court's decision.

Failure by Circuit Court to Uphold Stay of Running Timetable On Petition for Review and Motion to Reopen is Reversible Error:

The Circuit Court of Appeals held that the timetable for filing motions to reopen is unaffected by the filing of a petition for

review with the court of appeals. **Appendix A-3.** In doing so, they relied upon an expansive reading of **INA sec. 240(C)(6)(C)(i)**, and **8 C.F.R. sec. 1003.2**, one dealing with voluntary departure, the other with filing petitions to reopen/reconsider. They state, in pertinent part:

> **On Conditions of Motions to Reopen: 8 C.F.R. sec. 1003.2**
>
> 1003.2—Reopening or reconsideration before the Board of Immigration Appeals.
>
> (c) Motion to Reopen. (1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material.....A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is **material and was not available and could not have been discovered or presented** at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the aliens's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the [initial] hearing.
>
> (2) Except as provided in paragraph (c)(3) of this section, a party **may file only one motion** to reopen

> deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed **no later than 90 days after the date on which the** final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, **an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge)** and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

Most pertinently, the Circuit Court relied upon the decision of the Supreme Court in **Stone v. INS**, 514 U.S. 386 (1995) as applied to the decision of the court of appeals in **De La Cruz v. Mukasey**, 532 F.3d 946 (9th Cir. 2008). In **Stone v. INS**, the Supreme Court held that when an immigrant files for a motion to reopen, or for any appeal to an administrative appeal agency like the BIA, the appellate timetable for filing a petition for review is not tolled from continuing to run, and does not prevent the original administrative order, in this case a BIA de novo ruling on appeal from an Immigration Judge's determination. **Id.** at 386. In **De La Cruz**, the court of appeals went on to cite the Supreme Court's reasoning in

Stone v. INS that a final order of removal is no less final because a motion to reopen or reconsider has been filed. **De La Cruz**, 532 F.3d at 949. As a result, the Ninth Circuit held that just as with motions to reopen and reconsider, petitions for review in the appellate had no effect on the finality of an order for removal. **Id.**, at 949.

First, the ruling in **De La Cruz** was tortured reasoning to say the least. The ruling completely ignored the fact that **Stone v. INS** had nothing to say about the effect of federal appellate courts operating under Article III of the Constitution and their rulings upon the effect of administrative rulings that they themselves are reviewing through a lawful appellate process which they are charged by the INA to review, involving legal and factual issues rather than factual matters requiring discretionary review. *See* **INA sec. 240A (c)(2), 8 U.S.C. sec. 1229a(c)(7)(A),(C)(i)**. The court of appeals ignored the fact that they observe routinely with appeals by immigrant litigants that come before them and the other circuits, that when a petition for review is filed the petitioner

will file a motion for stay of removal—a stay of enforceability pending review. And such stay of enforceability acts in similar fashion on the effects flowing from that stay, including prevention of cutoff of the ability to file petition to reopen. But that basic principle, that the effect of a stay of removal from a higher court of review to a lower court or administrative tribunal, issued by a court in equity as in the nature of a temporary injunction, was held non-applicable in **De La Cruz**. Id. at 949.

The holding in De La Cruz is a reversal of years of prior custom and practice, and it further failed to address significant differences between motions to the Executive Branch—the Department of Homeland Security, the Administrative—both the Immigration Court and Administrative Appeals Office (AAO), the BIA, and Petitions for Review with the circuit courts of appeals (and by similar fashion, petitions for writ of certiorari with the Supreme Court). Indeed, no other circuit court of appeals has made

such a ruling, after a thorough search of all cases in light of **Stone v. INS** and **De La Cruz**.

The Ninth Circuit in **De La Cruz** was a decided violation of the due process and/or equal protection rights of the Petitioners, due to the cutoff of post-order rights of review, which is the very purpose of motions to reopen or reconsider. The circuit court, when an individual immigrant files an appeal from a decision of an Immigration Judge and the appeal de novo-reviewed decision made by the BIA, acts as a court of equity when it receives a motion to grant stay pending review paired with the immigrant's petition for review. The court immediately grants temporary relief pending the review of the motion for removal, and when the circuit court grants the motion for removal it acts as the same as a trial court's temporary injunction, with the effect of stopping not only the act of enforcement of the order dictating removal of the immigrant, but with all effects of the order of removal, including the time available for post-proceeding relief. When

the BIA failed to recognize that principle by declaring, in its opinion denying the Motion to Reopen in the present case, that the petition for review did nothing to toll or stop the timetable to file a motion to reopen and withdraw voluntary departure, was a deprivation of the Petitioners' right to justifiable reliance on the court's stay of removal. That acted to deny the Petitioners' the ability to pursue their rights before the circuit court without sacrificing their right to review based upon changed circumstances, which are the precise purpose for the option made available in the remedy of a stay of removal. **Nken v. Holder**, 556 U.S. at ___ (2009), 2009 LW 1065976, at 5-8; ***See*** **Scripps-Howard Radio, Inc. v. FCC**, 316 U.S. 4, 9-10 (1942) ("An appellate court's power to hold an order in abeyance while it assesses the order's legality has been described as inherent, and part of a court's "traditional equipment for the administration of justice."). To refuse the Petitioners the benefit of that remedy, which is freely available to individuals who take cases on appeal from both district courts as well as administrative courts and tribunals such as

immigration courts and the BIA, acts as a selective denial of due process that runs afoul of both the due process and equal protection clauses of the 14th Amendment of the U.S. Constitution. *See* **Reno v. American-Arab Anti-Discrimination Comm. (AADC)**, 525 U.S. 471,481-82; 119 S.Ct. 936, 142 L.Ed.2d 940 (1999); **Andreiu v. Ashcroft**, 253 F.3d 477 (9th Cir. 2001)(en banc).

The notion that this equal protection and due process claim is denied them due to their immigration status is not acceptable under the rubric that exists, as propounded by the Court in **Plyler v. Doe**, 457 U.S. 202, 207 (1982), that once a statute is enacted by Congress governing exclusive federal jurisdiction, as is with immigration, that has a rational basis for its establishment, it both must be uniform, not arbitrary, and must be subject to universal application. This Board has held that in interpreting a statute we look first to the language of the statute. **Matter of Nolasco**, 22 I&N Dec. 632, 635-36 (BIA 1999). "The paramount index of congressional intent is the plain meaning of the words used in the statute taken as a

whole." **Id.** , citing ***INS* v. Cardoza-Fonseca**, 480 U.S. 421,431 (1987); S***ee also*** **Matter of Michel**, 21 I&N Dec.1101 (BIA 1998). Where the language is clear, we must give effect to the unambiguously expressed intent of Congress. **Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.**, 467 U.S. 837, 843 (1984). Further, "[where] Congress includes a particul11]: language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." **Russelio v. U.S.**, 464 U.S. 16,23 (1983) (internal citations omitted).

Likewise, the construction of the effect of **8 U.S.C. sec. 1229a; 8 C.F.R. 1003.2**, is to be applied, as to the rules of appellate review, in the same fashion as that of any other person given standing to lodge a petition for appellate relief before a neutral court of review holding binding sway over the Board of Immigration Appeals or an Immigration Judge (IJ). Dictating that Petitioners file their Motion to Reopen prior to

ninety days without regard to the filing of petition for review, has no language in **8 U.S.C. sec. 1229a(c)(7)(A)**, nor, more importantly in **Fed. Rules. App. Pro. 8 and 18,** governing stays of removal in the circuit courts of appeals.

The difference in filing motion to reopen ....in BIA, part of the immigration system is in the Department of Homeland Security and is therefore can be subject to administrative limitations. Filing petition for review however, is to a separate, neutral, and higher authority. **Nken v. Holder**, 556 U.S. at ____, 2009 LW at 1065976 *7. The Ninth Circuit's failure to observe that distinction is violative of equal protection and due process under the 14th Amendment, demanding that, as it required a disregard of Petitioners' rights so as to ensure their loss. Inasmuch as **DeLa Cruz v. Mukasey** required the Ninth circuit court to disregard their own equitable powers in a way that the Congress did not expressly nor by implication allow, the Petitioners' to use their own discretion, constituted the abovementioned violations of constitutional protection.

Therefore the Court should order the grant of the stay of removal, and grant the motion to reopen, allowing post-decision requests for relief.

Failure of Ninth Circuit in Misinterpreting Stone v. INS in applying De La Cruz v. Mukasey to Present Case is Reversible Error:

Not only does the Ninth Circuit have the rule that filing a petition for review not toll or reset the timetable running to finality for a de novo appellate order of the BIA, but it is the rule of law for the BIA. **DeLaCruz**, **supra**, at 949; **In Re Zmijewska**, 24 I&N Dec. 87 (BIA 2007). The Ninth Circuit had that in mind when they applied Stone v. INS in enunciating the rule in **DeLaCruz**. **Id**. at 949. The fact is that both the BIA and the Ninth Circuit, in making their policy and determination, respectively, misapplied the rule made in Stone v. INS, for a variety of reasons. Part of it involves the denial of due process and equal protection, which was addressed in the previous point of error. In the point of error here is the

nature of the relationship of the Immigration court and appellate system, and how the decision of the court of appeals in inverting the rule in Stone to filings of motions to the BIA is a total misinterpretation.

A Motion to Reopen must generally be filed within 90 days of the date of entry of a "*final* administrative order of removal." **INA sec. 240 (C)(6)(C)(i)**. Historically in the Ninth Circuit, an alien's timely petition for review with the circuit court would not exhaust any of the time that they are granted by statute to file an motion to reopen with the BIA. However, despite the lack of any statute or Supreme Court ruling explicitly on point, the decision in **De La Cruz** inexplicably reversed course from custom and practice and held that a petition for review would not toll or reset the motion to reopen deadline. **De La Cruz**, **supra**, at 947. The court of appeals reasoned that the holding of **Stone v. INS**, **supra**, was easily applied to cases involving inverse factual situations. **De La Cruz**, **supra**, at 949. The court went on to cite the Supreme Court's reasoning in **Stone v. INS** that a

final order of removal is no less final because a motion to reopen or reconsider had been filed. **Id.** at 949. Based on that conclusion, the circuit court held that, similar to motions to reopen and reconsider, petitions for review before the courts of appeals had no effect on the finality of an order for removal. **Id.**

Years of prior custom and practice were reversed by the holding in **De La Cruz**, in which it was so assumed that a filing of a petition for review, with its conjoining stay of removal, would reset or at least toll the running of time to finality of an administrative judgment by the BIA or immigration judge, that the Petitioner's previous attorney is alleged to have committed ineffective assistance of counsel by waiting to file the later motion to reopen until more than two months after the Court of Appeals initial decision herein. **Appendix A-8, Exhibits D,E,F--Petitioner's Brief).**

Note: Petitioners hereby notify the Court that Petitioners have also filed a Motion to Reconsider/Motion to Reopen with the BIA, based upon the apparent ineffective

assistance of counsel by former counsel in the filing with the original Motion to Reopen that, based upon the BIA/Ninth Circuit's appealed-from ruling, was denied/dismissed due to being adjudged as untimely filed. The Petitioners are notifying the BIA simultaneously with this Petition of this appeal to the Supreme Court, and requesting that Motion to Reconsider/Reopen, postpone consideration until determination by this Court, which will be set aside upon positive disposition of the pertinent issues of this case by this Honorable Court. (***See*** **Appendix A-8**). [End Notice].

But as said earlier in discussion of the BIA and Ninth Circuit's due process and equal protection violations, the ruling in **De La Cruz** failed to ascertain major differences between post-order motions to reopen or reconsider prior rulings to the Department of Justice, Administrative Law Judge (such as IJ) and BIA, and Petitions for Review (or for that matter, Petitions for Writ of Certiorari) to Article III federal courts of appellate review empowered to affirm or

reverse decisions by both judicial trial and administrative tribunals.

Simply stated, a motion to reopen or reconsider filed with the BIA does nothing more than ask an executive agency to reexamine its own ruling. Whether the motion is granted based on a misapplication of the law by an IJ, or under the BIA's own *sua sponte* power, it is the agency that is acting upon its own order and thus the "finality" of the order is not truly effected. Indeed, the agency is granted by statute the option of reopen or reconsider to reinstate their petition for cancellation of removal via unforeseen circumstances/previously undiscovered evidence showing extreme and extraordinary circumstances, as well as other special circumstances following judgments in absentia. **INA sec. 240A(C)(6)(C); 8 U.S.C. sec. 1229c (f) (1)(2).**

In contrast, a petition for review with a circuit court is undeniably an appeal to a neutral outside entity, under a different branch of government, imbued by Congress with power to review the actions of an administrative agency,

including determinations by administrative law judges and boards of appellate reconsideration, such as BIA. Because the avenue of review by the circuit courts are outside the boundaries of the administrator, it already differs in both form and substance from a motion filed with BIA. Moreover, should an appellate court grant an alien's petition, the court has the power to reverse and vacate a prior order of the government agency, provided it falls within the review parameters granted by Congress. These distinctions are highly significant and extremely relevant to the issue of "finality". A BIA or IJ order of removal can hardly be said to be "final" if an outside party has authority to review and, when supported by the legal principles applicable, to remand, reverse, vacate, or even direct an opposite result through its own order which is, of course, binding, as expected for appellate courts created under Article III. **INA sec. 242(a); 8 U.S.C. sec. 1252(a)**; *See* **Nken v. Holder**, **supra**, 581 U.S. at ___, 2009 USLW at 1065976 *5-8 (2009).

Therefore, certainly the prospect of revocation of administrative judgments by BIA, et al, are certainly not foreclosed by finality, least of all instances of review of legal non-discretionary issues by the courts of appeals. Furthermore, the grant of temporary stays of removal and voluntary departure during the pendency of a petition for review clearly shows that appellate power of review extends to effect "finality" of both kinds of orders, most pertinently here the order of removal. **Id.** As discussed above, a no-bar petition for review would leave the Office of Immigration and Customs Enforcement free to disregard the de facto injunction of a stay of removal, apprehend and remove aliens even while their appeals are pending with a circuit court of appeals, or even with this Honorable Court.

In addition, it is not uncommon for a petition for review to take many months, or even years, to gain a dispositive ruling in the circuit courts of appeals, not to mention the additional time should sufficient legal issues arise, as is the case here, to allow for petition for appropriate relief

to the Supreme Court. However, should an alien's petition ultimately be denied, only those whose cases were heard and decided within 90 days would still have the right of reopen or reconsideration with the BIA. In effect, it eliminates the right of post-order relief to virtually everyone, unless they have the fortune to have opportunity to obtain newly discovered evidence within 90 days and take the time to file on it, or they have been the subject of an in absentia order, and they have had been victimized by procedural errors in its process. **INA sec. 240 (c)(7)(C)(i), 8 U.S.C. sec. 1229a(c)(7)(c)(i).**

Indeed, **De La Cruz** dictates other absurd results in addition to the manifestly unjust result related above. For instance, an immigrant can, upon an adverse determination by the IJ or BIA, file an immediate petition for review with the circuit court of appeals, couple it with an order of stay of removal and the time for voluntary departure, and during its pendency a new and exceptionally compelling reason can arise that justifies an order to reopen the case, such as the serious brain tumor involved here. However, that reason must fall within

90 days of a BIA "final" order, or 180 days in the case of an in absentia order, otherwise it becomes moot. In effect, the post-order remedy made in law by Congress allowing motions to reopen/reconsider is rendered worthless by the BIA and the Ninth Circuit in **De La Cruz**, demanding its reversal.

In **Stone v. INS**, the Court herein said the following:

> Underlying considerations of administrative and judicial efficiency, as well as fairness to the alien, support the conclusion that Congress intended to depart from the conventional tolling rule in deportation cases. While an appeal of a deportation order results in an automatic stay, a motion for agency reconsideration does not. Congress might not have wished to impose on aliens the Hobson's choice of petitioning for reconsideration at the risk of immediate deportation or foregoing reconsideration and petitioning for review to obtain the automatic stay. In addition, the tolling rule's policy of delayed review would be at odds with Congress' fundamental purpose in enacting §106, which was to abbreviate the judicial review process in order to prevent aliens from forestalling deportation by dilatory tactics in the courts." **Id.** at 397-400.

There is nothing in **Stone v. INS** that would indicate that their decision, which, in effect upholds the superior position of the federal circuit courts under Article III in imposing limitations on access for review by litigants-appellants, over that of the authority of administrative tribunals in their requirement-

setting, that would indicate that the inverse should be imposed upon litigants in like manner. Indeed, **Stone** would actually imply that the opposite would be true.

Congress explicitly granted an alien the right to have his case reopened or reconsidered on the basis of new evidence that becomes available. While the INA states that an alien has 90 days from the issuance of a final administrative order in which to file a motion to reopen, the statute is silent as to the effect of an appeal with the Circuit Courts of Appeals. An appeal to the Circuit Courts is most often predicated on either a misapplication of the law by an IJ or the BIA or because of an abuse of discretion. These critical issues are still properly within the ambit of the court of appeals, and based on that fact, the courts of appeals have the authority, indeed the responsibility, to stay the effects of any allegedly "final" administrative orders, just as in the case of orders from the federal district courts, and to fail to properly apply that responsibility to ensure proper access to appellate process and preserve the rights of immigration petitioners and their U.S.

citizen co-litigants, is to clearly frustrate the intent of Congress. Because the authority vested in the circuit courts of appeals undeniably have the effect of both potential stay and reversal any orders deemed "final" from an administrative agency, and since Congress could have limited the power of appellate courts in the area of stay of administrative orders, but chose not to, the Court herein is well-served in applying its power of review over the courts of appeals. **Kucana v. Holder**, 558 U.S. ____ , 130 S.Ct. at 829 (2010). The Court should rule that the acceptance of a petition for review resets the 90-day clock allowed to make motion to reopen post-decision based upon newly discovered evidence, until after issuance of mandate, which is the final order rendering the previous administrative order final. ***See*** **8 U.S.C. sec. 1229c (f)(1),(2), 8 C.F.R. sec. 1003.2 (c)(1)**. Indeed, the Circuit Court acknowledged its power in announcing its decision by stating that the stays of removal and on voluntary departure was lifted effective the date of the mandate. **Appendix A-3 at 3**.

Therefore, the Court should rule that the Ninth Circuit's holding in **DeLa Cruz v. Mukasey** frustrates the intent of Congress, and therefore hold it overruled, reasserting the principle within the intent of **8 U.S.C. sec. 1229a**, that a timely-filed circuit court of appeals' decision stays the "finality" of an order of removal while the petition is pending, and that an alien has 90 days from the issuance of the circuit court's mandate to file a motion to reopen with the BIA.

REQUEST FOR STAY OF REMOVAL:

Petitioners, in addition to the relief that is sought in this appeal herein, beseech the Court to grant a Stay of Removal and of enforcement of voluntary departure, pursuant to the Order by the Board of Immigration Appeals, as enunciated in **Nken v. Holder, supra**, 556 U.S. at ____, 2009 USLW 1065976 (2009) . The Petitioners otherwise would suffer irreparable harm if such stay is denied, Petitioners have a likelihood of success on the merits of this appeal, there is an appreciable lack of hardship to the government for the stay to be in place during pendency of the appeal, and a significant

public interest in granting the stay to petitioners, by allowing them to maintain care for their U.S. citizen daughters during the course of the review and arriving at a decision by this Honorable Court in the case herein.

CONCLUSION AND PRAYER FOR RELIEF

Petitioners therefore request and pray for this Honorable Court to grant the following relief, in the form of the following proposed Order:

That the Court hold that the order made by the Ninth Circuit Court of Appeals, refusing the Petitioners right to file for a Petition to Reopen, as applying the Ninth Circuit's holding in **De La Cruz v. Mukasey**, is an unconstitutional denial of due process and equal protection, as found in the 14th Amendment of the United States Constitution.

Or, in the alternative, the Court should declare that the Ninth Circuit's decision in **De La Cruz v. Mukasey** is a misapplication of the Supreme Court's decision in **Stone v.**

INS. As a result, the Court is requested to overrule **De La Cruz v. Mukasey** as wrongly decided. As a result, the Court is requested to rule that Petitioners are permitted to proceed with their Motion to Reopen to the BIA. Further, the Court is requested to hold that, as the principle of **De La Cruz v. Mukasey** is the application of the policy of the BIA, that the BIA and the Department of Homeland Security cannot hold that the filing of a petition for review, coupled with an order upon motion granting stay of removal, with the circuit courts does not toll or reset the time before which an administrative order of removal is final.

Third, Petitioners request that the Court hold that the filing of a petition for review, coupled with a motion for stay of removal, halts the running of the time period for voluntary departure, and resets it until the final court of appellate review has ruled upon the Petitioners' claims.

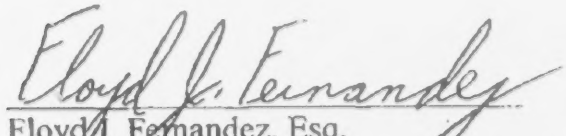
Fourth and finally, Petitioners request that the Court remand the case herein to the Ninth Circuit, ordering the Circuit Court to withdraw its holding disallowing Petitioners

motion to reopen based upon the expiration of the time for voluntary departure, and suspend the order of removal following therefrom, and direct the Circuit Court to remand the case to the BIA with directions that the Petitioners be allowed to pursue their Motion to Reopen.

Also, Petitioners plead for a stay of removal of the order issued by the Board of Immigration Appeals, be granted by this Court pending the conclusion of this Petition.

For this and other appropriate relief which, in law or equity, the Court herein finds appropriate, all upon a Grant of the Petition for Writ of Certiorari made to this Court, the Petitioners hereby make this their prayer for relief.

Respectfully submitted,



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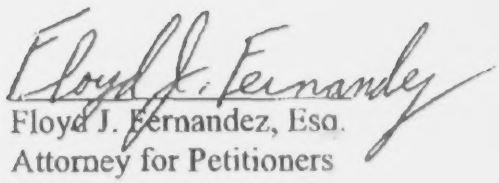
CERTIFICATE OF SERVICE

I, FLOYD J. FERNANDEZ, Attorney for Petitioners herein, do certify under penalty of perjury that I have this the 25 day of October, 2010, served and notified each of the understated representatives of the various agencies, plus the respective tribunals affected herein the foregoing Petition for Writ of Certiorari, with all required supporting documents, along with the appropriate request for administrative records from the above mentioned tribunals, via dispatch by commercial postal service FedEx, in Ventura, California, United States, with appropriate confirmation for each being assumed in this matter.

Solicitor General of the United States
Room 5614, U.S. Department of Justice,
950 Pennsylvania Ave., N. W.
Washington, DC 20530-0001.



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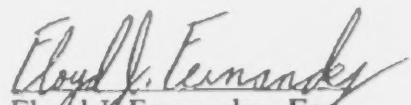

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APPENDIX

APPENDIX ..... A

Unpublished Order of U.S. Court of Appeals for the Ninth Circuit: Case No. 08-73848... A-1

Order of Mandate of U.S. Court of Appeals for the Ninth Circuit: Case No. 08-73848..... A-2

Unpublished Order of U.S. Court of Appeals for the Ninth Circuit: Case No. 09-73795....A-3

Order Denying Rehearing of U.S. Court of Appeals for the Ninth Circuit: Case No. 09-73795..... A-4

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APPENDIX A-1

Unpublished Order of U.S. Court of Appeals for the Ninth Circuit: Case No. 08-73848

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-73795

Agency Nos. A-096-349, A-096-346-350

JESUS MORA FLORES and LETICIA CERVANTES, Petitioners,
v.

ERIC H. HOLDER, Jr., Attorney General, Respondent

ORDER

Before: LEAVY, RAWLINSON, and CALLAHAN, Circuit Judges.

Petitioner Jesus Mora Flores' motion to have his wife, Leticia Cervantes, A-096-346-350, added as a petitioner to this petition for review is granted. The Clerk shall amend the docket accordingly.

We have reviewed the response to the court's September 18, 2008 order to show cause, and we conclude that petitioners have failed to raise a colorable constitutional or legal claim to invoke our jurisdiction over this petition for review. *See*

Martinez-Rosas v. Gonzales, 424 F.3d 926 (9th Cir. 2005) ("traditional abuse of discretion challenges recast as alleged due process violations do not constitute colorable constitutional claims that would invoke our jurisdiction"); *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001). In addition we lack jurisdiction to consider unexhausted claims that could have been corrected by the Board of Immigration Appeals. *See* 8 U.S.C. sec. 1252(d)(1); *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004). Accordingly, respondent's motion to dismiss this petition for review for lack of jurisdiction is granted. *See* 8 U.S.C. sec. 1252(a)(2)(B)(i); *Romero-Torres v. Ashcroft*, 327 F.3d 887, 892 (9th Cir. 2003); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002).

All other pending motions are denied as moot. The temporary stay of removal and voluntary departure confirmed by Ninth Circuit General Order 6.4(c) and

Desta v. Ashcroft, 365 F.3d 741 (9th Cir. 2004), shall continue in effect until issuance of the mandate.

DISMISSED.

APPENDIX A-2

Order of Mandate of U.S. Court of Appeals for the Ninth Circuit: Case No. 08-73848

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 08-73848
Agency No. A-096-346-349
A-096-346-350

JESUS MORA FLORES; LETICIA CERVANTES,

Petitioners,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

MANDATE

The judgment of this Court, entered 02/26/2009, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

/s/
By: Theresa Benitez
Deputy Clerk

APPENDIX A-3

Unpublished Order of U.S. Court of Appeals for the Ninth Circuit: Case No. 09-73795

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 08-73848
Agency No. A-096-346-349
A-096-346-350

JESUS MORA FLORES; LETICIA CERVANTES,

Petitioners,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

ORDER

Before: LEAVY, RAWLINSON and CALLAHAN, Circuit Judges.

This is a petition for review of the Board of Immigration Appeals' ("BIA") order denying petitioners' motion to reopen removal proceedings. We review for abuse of discretion the BIA's denial of a petition to reopen. *Perez v. Mukasey*, 516 F.3d 770, 773 (9th Cir. 2008).

An alien who is subject to a final order of removal is limited to filing one motion to reopen removal proceedings,

and that motion must be filed within 90 days of the date of entry of a final order of removal. 8 U.S.C. sec. 1229a(c)(7)(A),(C)(i); 8 C.F.R. sec. 1003.2(c)(2). Because petitioners' motion to reopen was filed beyond the 90-day deadline, and petitioners have not established that equitable tolling or an enumerated exception applies, the BIA did not abuse its discretion in denying petitioners' untimely motion to reopen. *See id.* Further, petitioners' contention that the filing of a petition for review should toll the time limit to file a motion to reopen is foreclosed by *Dela Cruz v. Mukasey*, 532 F.3d 946 (9th Cir. 2008), and petitioners' argument that this court should overturn *Dela Cruz* is unavailing. Finally, we reject petitioners' argument that the BIA erred in denying their motion to withdraw their request for voluntary departure because petitioners had overstayed their voluntary departure. *See Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1174 (9th Cir. 2003) ("[T]he voluntary departure period begins when an Immigration Judge or the BIA enters an order granting voluntary departure."); *cf.* 8 C.F.R. sec.

1240.26(f)("Authority to extend the time within which to depart voluntarily ... is only within the jurisdiction of [Immigration and Customs enforcement officials].").

Accordingly, this petition for review is summarily denied because the questions raised are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982)(per curiam)(stating standard).

All other pending motions are denied as moot. The temporary stay of removal shall continue in effect until issuance of the mandate.

PETITION FOR REVIEW DENIED.

APPENDIX A-4

Order Denying Rehearing of U.S. Court of Appeals for the Ninth Circuit: Case No. 09-73795

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-73795
Agency Nos. A096-346-349
A096-346-350

JESUS MORA FLORES and LETICIA CERVANTES,

Petitioners,

v.

ERIC H. HOLDER Jr., Attorney General,
Respondent.

ORDER

Before: LEAVY, RAWLINSON and CALLAHAN, Circuit Judges.

The petition for panel rehearing is construed as a motion for reconsideration. So construed, the motion is denied. *See* 9th Cir. R. 27-10. No further filings shall be accepted in this closed case.

FILED: MAY 21, 2010

MOLLY C. DWYER, CLERK, US. NINTH COURT OF APPEALS.

APPENDIX A-5

Unpublished Final Order of Board of Immigration Appeals: August 8, 2008.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: A-096-346-349 – Los Angeles, CA
A-096-346-350

Date: August 8, 2008

In re: JESUS MORA FLORES
LETICIA CERVANTES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Joseph S. Porta, Esquire

APPLICATION: Cancellation of removal under section 240A(b).

This record was last before us on April 25, 2007, when we granted the respondents' motion to accept their untimely appeal due to the ineffective assistance provided by the respondents' former counsel. We accepted the Notice of Appeal on certification and deemed that it was timely filed. The respondents are a husband and wife, who are both

natives and citizens of Mexico. They appeal the Immigration Judge's denial of their applications for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. sec. 1229b. The respondents' appeal will be dismissed. The request for oral argument is denied. *See* 8 C.F.R. sec 1003.1(e).

We adopt and affirm the decision of the Immigration Judge with the following additions. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). On appeal, the respondents argue that the Immigration Judge erred in determining that their United States citizen children would not suffer exceptional and extremely unusual hardship upon the respondents' removal to Mexico. We agree with the Immigration Judge's determination that the respondents

failed to establish that their children would suffer such hardship. *See* section 240A(b) of the Act.

The respondents argue that their United States citizen daughter, Ruby, is enrolled in honors courses and passed the GATE program test and she will have to forgo these unique educational opportunities if the respondents are removed to Mexico. We recognize that Ruby is a bright and talented child. We additionally recognize that Ruby may not have the opportunity to participate in honors classes or a program similar to GATE in Mexico. Both Ruby and Jessica may not have access to educational opportunities equal to those which can be obtained in the United States. However, we do not find that this situation is equivalent to that which we contemplated in *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001), nor that it constitutes an exceptional or extremely unusual hardship. *See Matter of Andazola*, 23 I&N Dec. 319, 323 (BIA 2002) (noting that reduced educational opportunities did not constitute exceptional and extremely unusual hardship).

In addition, although the respondents' children will face separation from extended family members, with whom they have close-knit relationships, we do not find that this constitutes an exceptional or extremely unusual hardship. *See Matter of Monreal, supra, at* 65 (holding that an applicant for cancellation of removal must demonstrate that his or her removal would cause hardship to his or her qualifying relative that is "substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here").

The respondents also indicated that their daughter, Ruby, has life-threatening asthma and has to receive regular medical treatments and take daily medication. The respondents argue that they may have difficulty obtaining necessary medical services or medications in Mexico. The respondents point out that they submitted a doctor's letter indicating that needed medical services cannot be provided in Mexico. However, as the record reflects, there is no indication whether the author of this letter (Dr. Liebhaber)

has first-hand knowledge relating to this assertion or which source of information was relied upon to draw such conclusion. The Immigration Judge indicated that the letter could not be given much weight, due to unavailability of the author for cross-examination. *See* Tr. At 42-43. On appeal, the respondents note that they are unaware of whether they will have access to all of the needed medications in Mexico. We agree that there is insufficient evidence that medical treatment or the needed medications would be unavailable or prohibitively expensive in Mexico.

In sum, considering the hardship factors cumulatively, including those in the record and those discussed on appeal, we agree that the respondents failed to sufficiently establish that their United States citizen children would suffer an exceptional and extremely unusual hardship upon the respondents' removal to Mexico.

ORDER: Accordingly, the respondents' appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondents are permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security ("DHS"), formerly the Immigration and Naturalization Service). *See* section 240B(b) of the Act; 8 C.F.R. secs. 1240.26(c), (f). In the event the respondents fail to so depart, the respondents shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondents fail to depart the United States within the time period specified, or any extensions granted by the DHS, the respondents shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period for a period of 10 years for any further relief under section 240B and sections

240A, 245, 248, 249 of the Act. *See* section 240B(d) of the Act.

FOR THE BOARD

APPENDIX A-6

Unpublished Final Order of Board of Immigration Appeals: October 29, 2009

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: A-096-346-349 – Los Angeles, CA
A-096-346-350

Date: October 29, 2009

In re: JESUS MORA FLORES
LETICIA CERVANTES

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Robert F. Jacobs, Esquire

ON BEHALF OF DHS: Rubab Z. Razvi
Assistant Chief Counsel

APPLICATION: Reopening

The Board issued the final administrative order in this case on August 8, 2008. Our order reinstated the 60-day voluntary departure period granted by the Immigration Judge. On July 15, 2009, the respondents filed a motion requesting to withdraw their request for voluntary departure pursuant to

Dada v. Mukasey, ___ U.S. ___, 128 S.Ct. 2307 (2008) ("*Dada* Motion"). On July 20, 2009, the respondents filed a separate motion to reopen seeking an opportunity to present additional hardship evidence in support of their applications for cancellation of removal. The Department of Homeland Security opposes the motions, arguing that the voluntary departure period had already expired when they filed their *Dada* motion and that they were thus subject to the voluntary departure bar and ineligible for discretionary relief. The DHS also opposes the motion to reopen because it is untimely.

The respondents assert in their *Dada* Motion that: on September 8, 2008, they filed a petition for review of our August 8, 2008, decision with the United States Court of Appeals for the Ninth Circuit; that the court dismissed their petition for review on February 26, 2009; and, that the mandate issued on May 19, 2009. Thus, approximately one month of their voluntary departure period had already expired when they filed their petition for review. The court temporarily stayed the approximately one-month period of

voluntary departure remaining when they filed their petition for review until the mandate issued on May 19, 2009. However, their *Dada* Motion was not filed until July 15, 2009, fifty-three days after the mandated issued and thus several weeks after their remaining voluntary departure period had expired. Accordingly, their motion to withdraw their request for voluntary departure is denied because they have not demonstrated that it was filed within the voluntary departure period. ı *Dada v. Mukasey, supra.*

Further, the respondents' motion to reopen for further consideration of their applications for cancellation of removal is denied as untimely because it was not filed within 90 days of the final administrative order issued by the Board on August 8, 2008. *See* section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. sec. 1229a(c)(7)(C)(i). Rather, it was filed eleven months after the final order. Contrary to the respondents' argument that they had 90 days from the court's mandate to file a motion to reopen with the Board, the statutory time limit for filing a

motion to reopen with the Board is independent of the proceedings in the Ninth Circuit. *See Stone v. INS*, 514 U.S. 386, 405, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995); *Dela Cruz v. Mukasey*, 532 F.3d 946, 949 (9th Cir. 2008) ("a petition for review of an order of removal does not toll the statutory time limit for the filing of a motion to reopen with the BIA."). We do not find that *sua sponte* reopening is warranted in this case because they are ineligible for the relief they are seeking. *See Grenados-Oseguera v. Mukasey*, 546 F.3d 1011 (9th Cir. 2008) (holding that the Board is "compelled" to deny a motion to reopen to apply for discretionary relief that is barred due to the failure to comply with a voluntary departure order); *Serrano v. Gonzales*, 469 F.3d 1317 (9th Cir. 2006). *See also Matter of Zmijewska*, 24 I&N Dec. 87 (BIA 2007) (the Board lacks authority to apply an "exceptional circumstance" or other equitable exception to the penalty provisions for failing to voluntarily depart within the time allowed).

Moreover, although we sympathize with the female respondent's medical condition, even if the respondents were

not barred from relief due to their failure to depart within the voluntary departure period, they have not shown that appropriate medical treatment is not available for the female respondent in Mexico or that her condition will more severely impact their children if she is treated in Mexico rather than in the United States. Further, the updated evidence related to their United States children's assimilation in this country and one child's acceptance into a gifted program does not create a situation so exceptional that resort to this extraordinary discretionary remedy is warranted. *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (the rules governing motions are intended to bring finality to proceedings and the Board's *sua sponte* authority is not meant to be used as a cure for filing defects or to otherwise circumvent the regulations where enforcing them might cause hardship). Accordingly, we will deny the motions.

---

1 The respondents also would not benefit under new rules governing the impact of filing a motion to reopen on voluntary departure grants even if those ruled applied in this case because their *Dada* Motion was not filed within the voluntary departure period. *See* 8 C.F.R. sec. 1240.26(e)(2) (2009).

ORDER: The motion to withdraw their request for voluntary departure is denied.

FURTHER ORDER: The motion to reopen is denied.

FOR THE BOARD

APPENDIX A-7

PACER (Public Access to Court Electronic Records) of Clerk of U.S. Court of Appeals for the Ninth Circuit.

APPENDIX A-8
Administrative Record of Case with Board of Administrative Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-73795

JESUS MORA FLORES, ET AL.,	)	
	)	
Petitioner	)	
	)	
Vs.	)	Petition for Review
	)	of Immigration Matter
ERIC H. HOLDER, Jr.	)	
	)	
Respondent	)	

CERTIFIED ADMINISTRATIVE RECORD

A96-346-349
A96-346-350

U.S. Department of Justice

Executive Office for Immigration Review

Office of General Counsel

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

Re: JESUS MORA FLORES

A-96-346-349
A-96-346-350

I, Shirley Raynor, declare as follows:

1. I am employed as a Government Contractor by the Executive Office for the Immigration Review of the United States Department of Justice. I am authorized to certify the authenticity of copies of documents on file in the Office of the Immigration Judge, Los Angeles, California.
2. The attached documents are true, correct and complete copies of the documents included in the Record of Proceeding to date, maintained in the above office on this case.

Pursuant to 28 USC 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed by: _____ on 12-24-09
(signature) (date)

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JESUS MORA FLORES

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No. 10-570

In the Supreme Court of the United States

JESUS MORA FLORES, PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
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QUESTIONS PRESENTED

1. Whether the filing of a petition for review in a court of appeals resets the time period during which an alien is allowed to voluntarily depart the United States.

2. Whether a motion to reopen removal proceedings, which "shall be filed within 90 days of the date of entry of a final administrative order of removal," 8 U.S.C. 1229a(c)(7)(C)(i), may instead be filed within 90 days of the issuance of a court of appeals mandate, if the alien has filed a petition for review.

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In the Supreme Court of the United States

No. 10-570

JESUS MORA FLORES, PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 70-72) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 84-89) and the immigration judge are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 2010. A petition for rehearing was denied on July 26, 2010 (Pet. App. 74). The petition for a writ of certiorari was filed on October 25, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who has no lawful immigration status, and who is found to be removable

from the United States, may be eligible for a form of relief known as cancellation of removal. Cancellation of removal may be available to an alien who has been continuously physically present in the United States for at least ten years, has not been convicted of a statutorily specified crime, and has demonstrated good moral character during the required period of physical presence. 8 U.S.C. 1229b(b)(1)(A)-(C). An alien who satisfies these criteria may be permitted to remain in the United States if his removal would cause "exceptional and extremely unusual hardship" to the alien's spouse, parent, or child who is a United States citizen or a lawful permanent resident. 8 U.S.C. 1229b(b)(1)(D). Even if an alien demonstrates eligibility for cancellation of removal, the decision whether to grant that relief is within the Attorney General's discretion. 8 U.S.C. 1229b(b)(1).

b. The INA also provides that the Attorney General may permit a removable alien who satisfies certain statutory criteria "voluntarily to depart the United States at the alien's own expense" in lieu of being removed. 8 U.S.C. 1229c(b)(1). An alien who departs voluntarily is not subject to the five- to ten-year period of inadmissibility applicable to an alien who has previously been removed. See 8 U.S.C. 1182(a)(9)(A). As with cancellation of removal, voluntary departure is granted at the Attorney General's discretion. 8 U.S.C. 1229c(a)(1).

The INA and federal regulations contain provisions designed to ensure that aliens who have been granted voluntary departure depart the United States in a timely fashion. For an alien who is granted voluntary departure at the conclusion of removal proceedings, "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2); see 8 C.F.R. 1240.26(e). An immigration

judge (IJ) who grants voluntary departure must also enter an alternate order of removal. 8 C.F.R. 1240.26(d). If the alien does not depart within the time specified in the order granting voluntary departure, the alternate order of removal becomes final and the alien becomes "ineligible, for a period of 10 years," to receive statutorily specified forms of discretionary relief. 8 U.S.C. 1229c(d)(1)(B).

c. Both the INA and the Attorney General's regulations permit an alien to file one motion to reopen removal proceedings after a final decision has been rendered by the Board of Immigration Appeals (Board). See 8 U.S.C. 1229a(c)(7)(A) and (B); 8 C.F.R. 1003.2(c). The purpose of a motion to reopen is to present "new facts" that may bear on an alien's eligibility for relief. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1). Subject to statutory exceptions not relevant here, any motion to reopen "shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(C)(i). An alien may withdraw his request for voluntary departure, provided that the motion is made before the voluntary departure period expires. *Dada* v. *Mukasey*, 554 U.S. 1, 6-7 (2008).

2. Petitioners, a married couple, are natives and citizens of Mexico. Administrative Record 165, 672, 793 (A.R.). They entered the United States illegally in June 1992. A.R. 672, 793. In March 2003, U.S. Immigration and Customs Enforcement (ICE) charged petitioners with being removable under 8 U.S.C. 1182(a)(6)(A)(i), for being present in the United States without having been admitted or paroled. A.R. 672, 793.

Petitioners conceded that they were removable as charged, A.R. 166, 184, but they sought relief in the form of cancellation of removal or, in the alternative, volun-

tary departure. A.R. 166. The IJ concluded that petitioners had failed to meet their burden to demonstrate that their removal would result in "exceptional and extremely unusual hardship" to their United States-citizen children. A.R. 168-172. The IJ explained that the childrens' separation from their cousins and friends was "the ordinary consequence of the parents' removal," and that reduced educational opportunities in Mexico do not constitute an exceptional and extremely unusual hardship. A.R. 170. The IJ acknowledged that cancellation of removal might be warranted if a qualifying relative had a serious health issue that could not be treated abroad, A.R. 171, but the IJ concluded that petitioners had not shown that their daughter's asthma condition could not be treated in Mexico. A.R. 171-172.

The IJ determined, however, that petitioners were eligible for voluntary departure, and he granted petitioners the statutory maximum of 60 days to depart the United States. A.R. 172-174.

3. The Board dismissed petitioners' appeal. Pet. App. 76-82. The Board agreed with the IJ's determination that petitioners did not qualify for cancellation of removal because they failed to establish that their children would suffer exceptional and extremely unusual hardship if petitioners were removed to Mexico. *Id.* at 77-78. The Board concluded that neither reduced educational opportunities in Mexico nor separation from extended family qualified as exceptional and extremely unusual hardships facing petitioners' children. *Id.* at 78-79. The Board also concluded that petitioners did not provide sufficient evidence to show that asthma medication for one of their daughters would be unavailable or prohibitively expensive in Mexico. *Id.* at 79-80.

The Board reestablished petitioners' voluntary departure period for 60 days from the issuance of its August 8, 2008 decision. Pet. App. 81.

4. On September 8, 2008, petitioners filed a petition for review. The court of appeals granted a temporary stay of removal, and it also stayed the 60-day voluntary departure period. No. 08-73848 Docket entry Nos. 1-2 (9th Cir.). On February 26, 2009, the court of appeals dismissed the petition for review. Pet. App. 64-66. The court concluded that petitioners "failed to raise a colorable constitutional or legal claim to invoke [federal court] jurisdiction over this petition." *Id.* at 64. The temporary stays of removal and of the 60-day voluntary departure period expired when the court of appeals issued its mandate on May 19, 2009. *Id.* at 65-66, 68.

5. On July 15, 2009, petitioners filed with the Board a motion to withdraw their request for voluntary departure. A.R. 109-113. On July 20, 2009, petitioners filed another motion with the Board to reopen the proceedings so that they could present additional evidence of hardship to their children. A.R. 20-34.

The Board denied both motions. Pet. App. 84-89. The Board concluded that petitioners' motion to withdraw their request for voluntary departure was untimely. *Id.* at 86. The Board explained that when petitioners filed their petition for review in the court of appeals on September 8, 2008, approximately one half of their permitted 60-day voluntary departure period had already elapsed. *Id.* at 85-86. Although the court of appeals had stayed petitioners' voluntary departure period, the court of appeals did not reset the voluntary departure period back to day one. *Id.* at 86. The clock restarted when the court of appeals issued its mandate on May 19, 2009, and the 60-day voluntary departure

period therefore expired more than a month before petitioners filed their motion to withdraw their request for voluntary departure on July 15, 2009. *Id.* at 85-86.

The Board also concluded that petitioners' motion to reopen the proceedings was untimely. Pet. App. 86. The Board explained that the motion to reopen was filed 11 months after the Board's August 8, 2008 order of removal, exceeding the statutory 90-day period in which a motion to reopen must be filed. *Ibid.*; see 8 U.S.C. 1229a(c)(7)(C)(i). The Board rejected petitioners' argument that they had 90 days from the issuance of the court of appeals mandate within which to file a motion to reopen. Pet. App. 86. The Board reasoned that the time limit for filing a motion to reopen is independent of the proceedings in the court of appeals. *Id.* at 86-87 (citing *Stone* v. *INS*, 514 U.S. 386, 405 (1995), and *Dela Cruz* v. *Mukasey*, 532 F.3d 946, 949 (9th Cir. 2008) (per curiam)).

The Board further concluded that even if the proceedings were reopened, petitioners would not qualify for cancellation of removal, because the additional evidence they sought to present did not demonstrate a situation so exceptional as to meet their statutory burden. Pet. App. 88. The Board therefore declined to exercise its regulatory authority to reopen administrative proceedings *sua sponte*. *Id.* at 87.

6. Petitioners filed another petition for review in the court of appeals, seeking review of the Board's denial of reopening. The court of appeals denied that petition. Pet. App. 70-72. The court concluded that the Board properly denied petitioners' motion to withdraw their request for voluntary departure, given that the voluntary departure period had already expired when the motion was filed. *Id.* at 71. The court of appeals also

concluded that the Board did not abuse its discretion in denying petitioners' motion to reopen as untimely, because a motion to reopen must be filed within 90 days of the entry of a final order or removal. *Id.* at 70-71 (citing 8 U.S.C. 1229a(c)(7)(C)(i)). The court of appeals rejected petitioners' argument that if an alien files a petition for review of a final order of removal, the 90-day statutory period for filing a motion to reopen begins when the court of appeals issues its mandate, explaining that this argument was foreclosed by circuit precedent. *Id.* at 71 (citing *Dela Cruz*, *supra*).

ARGUMENT

Petitioners contend (Pet. 27-35) that the statutorily specified time period for voluntary departure should be reset when an alien files a petition for review in a court of appeals. Petitioners further contend (Pet. 35-56) that the statutorily specified 90-day period in which an alien may file a motion to reopen proceedings before the Board should run from the issuance of the court of appeals mandate, not from the Board's entry of an order of removal. The court of appeals correctly rejected these arguments, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Petitioners contend (Pet. 27-35) that their 60-day voluntary departure period should have been reset when they filed their petition for review in the court of appeals, with that entire 60-day period beginning to run anew when the court of appeals issued its mandate. Petitioners cite no authority in support of their argument, and it is incorrect.

An alien is permitted to withdraw his request for voluntary departure only if the motion is made before

the voluntary departure period expires. See *Dada* v. *Mukasey*, 554 U.S. 1, 5-6 (2008). Petitioners do not dispute that, unless their 60-day voluntary departure period was reset when they filed a petition for review in the court of appeals, their motion to withdraw their request for voluntary departure was untimely.

Although some courts have held that a court of appeals may *stay* an alien's voluntary departure period while a petition for review is pending,[1] no court has held that the mere filing of a petition for review automatically resets an alien's voluntary departure period back to day one. That is unsurprising, given that "[a]uthority to extend the time within which to depart voluntarily * * * is only within the jurisdiction of" specified ICE officials. 8 C.F.R. 1240.26(f).

Petitioners' argument is based on the premise that "voluntary departure is meant to be a * * * reward." Pet. 31. To the contrary, as the Court explained in *Dada*, voluntary departure "is an agreed-upon exchange of benefits, much like a settlement agreement." 554 U.S. at 19. In exchange for various benefits, including

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[1] In *Dada*, this Court acknowledged disagreement in the courts of appeals regarding whether a court of appeals may stay a period of voluntary departure pending consideration of a petition for review on the merits. See 554 U.S. at 10-11. That issue is not presented in this case. The Board's order granting petitioners voluntary departure was issued on August 8, 2008. Pet. App. 76-82. Thus, when petitioners filed their petition for review on September 8, 2008, 31 days of the 60-day voluntary departure period had already elapsed. Even assuming that the court of appeals had the authority to stay petitioners' 60-day voluntary departure period, petitioners had only 29 days remaining within which to file a timely motion to withdraw their voluntary departure request. Petitioners, however, filed their motion on July 15, 2009, which was 55 days after the court of appeals issued its mandate on May 19, 2009.

not being subject to the five- to ten-year inadmissibility periods applicable to aliens who have previously been removed, see 8 U.S.C. 1182(a)(9)(A), an alien promises to "arrange for departure, and actually depart, within the 60-day period," *Dada*, 554 U.S. at 19. Far from being a reward, the short 60-day period in which petitioners were allowed to settle their affairs and depart the United States was a term of an agreement with the United States, for which petitioners received significant benefits.

Petitioners further contend (Pet. 31-32) that a petition for review should reset the voluntary departure period because aliens would otherwise have insufficient time to consider whether to seek judicial review. That argument is premised on a misunderstanding of the law. An alien does not forfeit his ability to challenge an order of removal if he complies with a voluntary departure order. An alien granted voluntary departure may file a petition for review within the statutory 30-day period, and then depart within the original 60-day voluntary-departure period as promised. By doing so, he is afforded the benefits of voluntary departure while honoring his commitment to timely depart, and he may continue to pursue his claims in the court of appeals. See, *e.g.*, *Rivera* v. *Mukasey*, 508 F.3d 1271, 1277 (9th Cir. 2007) (alien may voluntarily depart during pendency of appellate proceedings without prejudicing appeal); cf. *Nken* v. *Holder*, 129 S. Ct. 1749, 1755 (2009) (explaining that, in enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, Congress lifted the bar to a court of appeals adjudicating a petition for review after petitioning alien has departed).

Petitioners have identified no authority supporting their argument that their 60-day voluntary departure period should have been reset when they filed a petition for review in the court of appeals. The court of appeals correctly rejected that argument, and further review is not warranted.

2. Petitioners also contend (Pet. 35-56) that if an alien files a petition for review, the statutorily specified 90-day period during which an alien may file a motion to reopen removal proceedings runs from the issuance of the court of appeals' mandate, rather than from the Board's issuance of a final order of removal. The court of appeals correctly rejected that argument, and the issue does not warrant this Court's review.

a. Under 8 U.S.C. 1229a(c)(7)(C)(i), with specific statutory exceptions not relevant here, an alien who seeks to reopen his immigration proceedings must file a motion to reopen "within 90 days of the date of entry of a final administrative order of removal." An order of removal becomes final upon the dismissal of an appeal by the Board. *Stone* v. *INS*, 514 U.S. 386, 390 (1995); 8 U.S.C. 1101(a)(47)(B)(i); 8 C.F.R. 1241.1. In this case, the administrative order of removal became final on August 8, 2008, when the Board sustained the IJ's order. Pet. App. 76-82. Petitioners did not file their motion to reopen until July 20, 2009, many months after the time period for filing the motion had expired. There is no support for petitioners' argument that the 90-day period did not begin to run until the court of appeals issued its mandate. Indeed, petitioners' argument is inconsistent with this Court's interpretation of the INA in *Stone*.

In *Stone*, the Court held that the filing with the Board of a motion to reopen proceedings or to reconsider does not toll the statutory time limit for filing a

petition for review. The Court held that a removal order is "final when issued" by the Board, and the finality of the order "is not affected by the subsequent filing of a motion to reconsider." 514 U.S. at 405. That conclusion stemmed from the INA's consolidation provision, which provides that "[w]hen a petitioner seeks review of an order [of removal] under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order." 8 U.S.C. 1252(b)(6). The consolidation provision contemplates that an alien might file multiple petitions for review: one from the Board's final order of removal, and another from the Board's decision denying a motion to reopen or reconsider. *Stone*, 514 U.S. at 394.

The decision of the court of appeals in this case follows logically from *Stone*. As other courts have recognized, the Court's reading of the INA's consolidation provision in *Stone* "demonstrates Congress's intent that petitions for review and motions for reconsideration [or to reopen] be filed concurrently." *Randhawa* v. *Gonzales*, 474 F.3d 918, 921 (6th Cir. 2007); see also *Chen* v. *Gonzales*, 492 F.3d 153, 155 (2d Cir. 2007) (per curiam) ("Congress * * * contemplated that a motion to reopen or reconsider might be filed concurrently with a petition for review."). As a result, the courts of appeals to have considered the issue—including the Ninth Circuit in a published opinion that was binding on the court of appeals in this case—has concluded that just as the filing of a motion to reconsider did not affect the statutory period for filing a petition for review in *Stone*, "[t]he filing of a petition for review in [the court of appeals] does not toll the statutory time limit for filing a motion to reopen before the [Board]." *Dela Cruz* v. *Mukasey*,

532 F.3d 946, 947 (2008); see also *Chen*, 492 F.3d at 155; *Randhawa*, 474 F.3d at 922.

Petitioners' argument that the mere filing of a petition for review somehow renders the Board's removal order nonfinal is incorrect. As various courts of appeals have explained, a court of appeals has jurisdiction to entertain a petition for review only if the petition seeks review of a *final* removal order. See 8 U.S.C. 1252(a) and (d). If an order of removal "is not final until [a court of appeals] has issued its decision, then [the court] would have no jurisdiction over a petition for review until [it] had already decided it," which "cannot be the case." *Chen*, 492 F.3d at 155; see also *Randhawa*, 474 F.3d at 921 (holding that a reading of the consolidation provision that would render Board decisions "final orders" reviewable by a court of appeals, but not "final administrative orders" starting the clock for filing a motion to reopen, "makes no sense").

Petitioners have identified no authority supporting their position that the 90-day statutory period during which an alien may file a motion to reopen removal proceedings should run from the issuance of a court of appeals mandate on a petition for review of the Board's final order of removal, and not from the Board's issuance of the final order itself, as the INA provides. 8 U.S.C. 1229a(c)(7)(C)(i). Further review is therefore unwarranted.

b. Petitioners' argument (Pet. 40-45) that the refusal by the court of appeals to extend the 90-day statutory period for filing a motion to reopen violates the Due Process Clause, including its equal protection component, by "cut[ting] off post-order rights of review" does not warrant further consideration. Petitioners' equal protection argument is illogical. By asserting that an alien

who files a petition for review should have a longer period of time in which to file a motion to reopen, petitioners seek *more favorable* treatment than aliens who choose not to pursue federal court review of their administrative proceedings.

Furthermore, because both voluntary departure and cancellation of removal are discretionary forms of relief, there is no constitutionally protected property or liberty interest in obtaining such relief through a motion to reopen. See, *e.g.*, *Garcia-Mateo* v. *Keisler*, 503 F.3d 698, 700 (8th Cir. 2007) ("[T]here is no constitutionally protected liberty or property interest in discretionary relief from removal."); *Dekoladenu* v. *Gonzales*, 459 F.3d 500, 508 (4th Cir. 2006) (no property or liberty interest can exist when relief sought is discretionary), cert. denied, 554 U.S. 917 (2008); *Naeem* v. *Gonzales*, 469 F.3d 33, 38-39 (1st Cir. 2006) (alien has no protected property or liberty interest in discretionary relief of voluntary departure, reopening, or adjustment of status). Petitioners' due process claim therefore lacks merit.

c. Finally, this case would not be an appropriate vehicle in which to address petitioners' claim because the Board determined that even if petitioners' motion to reopen had been timely filed, petitioners would not be entitled to cancellation of removal. Pet. App. 87-88.

Petitioners sought to reopen their proceedings before the Board to present additional evidence showing that petitioner Cervantes Mora was physically ill, and to present further evidence showing that petitioners' children would be deprived of superior educational opportunities if petitioners were removed to Mexico. Pet. App. 87-88. The Board concluded, however, that the additional evidence petitioners sought to introduce would not demonstrate that medical treatment was unavailable to

petitioner Cervantes Mora in Mexico, nor would it demonstrate that her condition would more severely affect her United States-citizen children if she were treated in Mexico rather than the United States. *Id.* at 88. The Board further concluded that petitioners' new evidence relating to the children's assimilation in the United States, and to one child's acceptance into a gifted educational program, did not create a situation so exceptional "that resort to th[e] extraordinary discretionary remedy [of cancellation of removal] is warranted." *Ibid.*

Because the outcome of the case would not change even if petitioners were allowed to reopen their proceedings before the Board, this Court's review is not warranted. Cf. *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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